APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JANUARY 5, 2004

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 03-1996

DARIUS D. BISHOP; ERIC BARNES; CHARLES D. BISHOP; WILLIE J. BOOKER; JOHN F. BROWN; SAMUEL EVANS; ALVIN C. FLEMING; TODD HAYES; WILLIAM E. JAMES; CURTIS JOHNSON,

Appellants,

v.

STATE OF NEW JERSEY; THE NEW JERSEY DEPARTMENT OF PERSONNEL AND MERIT SYSTEM BOARD

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
D.C. Civ. No. 02-cv-05458
District Judge: The Honorable John W. Bissell, Chief Judge

Argued November 20, 2003

Before RENDELL, BARRY, and MAGILL,* Circuit Judges.

* The Honorable Frank J. Magill, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appendix A

(Opinion Filed: January 5, 2004)

OPINION

BARRY, *Circuit Judge*

I. BACKGROUND

The parties are familiar with the facts of this case, and, thus, we will provide but a brief summary of those facts at the outset, incorporating additional facts only as necessary to our discussion of the issues.

Plaintiffs/appellants are African-American firefighters, employed by the Newark Fire Department. In 2000, each plaintiff took the New Jersey Department of Personnel Fire Lieutenant/Fire Captain promotional examination, an exam administered by the State. On April 12, 2001, the results were released when the list of successful applicants eligible for promotion was promulgated by the New Jersey Department of Personnel and Merit System Board. Of the 287 men and women who took the exam, 129 passed and were listed in order of their score, from highest to lowest. Municipalities use this list to promote firefighters on the list in the order in which they are ranked as positions become available. The list is valid and in use until it expires on April 3, 2004.

Plaintiffs Darius Bishop, Alvin Flemming, and John Brown each passed the exam, and were ranked 66, 56, and 93 respectively.[1] Plaintiffs claim that the format and

1. These three are the only plaintiffs appealing the District Court's order. The other plaintiffs failed the examination, and it is clear that the statute of limitations has run as to them. *See Bronze Shields, Inc. v. New Jersey Dep't of Civil Serv.*, 667 F.2d 1074 (3d Cir.1981).

administration of the exam discriminated against minorities as evidenced by the disproportionately low numbers of minorities who passed the exam and the disproportionately lower ranking of those minorities who passed.

On April 12, 2001 (the day that the eligibility list was promulgated), Bishop filed an administrative appeal with the Merit System Board/Department of Personnel challenging the format and the administration of the exam. On January 21, 2002, plaintiffs filed a Charge of Discrimination with the EEOC against the Newark Fire Department only, alleging that the exam unlawfully operated to exclude them based upon race. On April 9, 2002, the EEOC issued to Bishop a Right to Sue letter with respect to his charge against the Newark Fire Department.

On May 7, 2002, plaintiffs filed their first complaint in the U.S. District Court for the District of New Jersey against the State of New Jersey and the New Jersey Department of Personnel and Merit System Board ("State Defendants"), and against the City of Newark and the Newark Fire Department ("City Defendants"), alleging violations of the Civil Rights Act of 1866, 42 U.S.C. § 1981 ("§ 1981"); Title VII of the Federal Civil Rights Act, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII"); and the Uniform Guidelines on Employee Selection Procedures issued by EEOC.[2] This complaint alleged that the nature and administration of the exam disproportionately excluded plaintiffs from promotion because of their race.

2. Plaintiffs also alleged violations of a 1980 Consent Decree between the City of Newark and the U.S. Department of Justice ("Consent Decree"), and violation of the New Jersey Law Against Discrimination, N.J. STAT. ANN. § 10:5-1, *et seq.* ("LAD").

Appendix A

On June 3, 2002, Bishop's administrative appeal to the Merit System Board was denied. On July 9, 2002, defendants in the first action filed motions to dismiss, claiming sovereign immunity and plaintiffs' failure to exhaust administrative remedies. On August 2, 2002, plaintiffs filed a Charge of Discrimination with the EEOC against the State Defendants, alleging that the exam had a disparate impact on plaintiffs, that the results were defective, and that plaintiffs were discriminated against in the preparation, administration, and validation of the exam.

On September 26, 2002, the District Court granted the State Defendants' motion to dismiss plaintiffs' first action as to them, and granted in part and denied in part the City Defendants' motion to dismiss. Most relevant to this appeal, the District Court dismissed plaintiffs' Title VII claim against the State Defendants because plaintiffs failed to name them in their first Charge of Discrimination filed with the EEOC.[3] Claims against the City Defendants remain pending in the first action.

On October 9, 2002, the EEOC issued to plaintiffs a Right to Sue letter with respect to the State Defendants.

3. The District Court also dismissed plaintiffs' EEOC Guidelines claim because the guidelines do not provide an independent cause of action; dismissed plaintiffs' Consent Decree claims for lack of standing because they were not parties to that decree; dismissed plaintiffs' § 1981 claim against the State Defendants on the ground of Eleventh Amendment immunity, but sustained their § 1981 claim against the City Defendants; and dismissed plaintiffs' LAD claims against the State Defendants while sustaining those claims against the City Defendants.

Appendix A

On November 14, 2002, plaintiffs filed their Complaint ("Complaint") in this action against the State Defendants, alleging violations of Title VII, LAD, § 1981, and the Consent Decree. Plaintiffs noted that they filed a Charge of Discrimination with the EEOC within 300 days of the last commission or the discriminatory employment practice—namely, the promotion of applicants from the eligibility list on July 20, 2002.

On December 18, 2002,[4] the State Defendants moved to dismiss the Complaint. On March 11, 2003, the District Court granted the State Defendants' motion, concluding that plaintiffs had not filed a charge with the EEOC within 300 days of the alleged discriminatory act, as mandated by 42 U.S.C. § 2000e-5(e)(1); that plaintiffs were not entitled to equitable tolling while Bishop's administrative appeal was pending; and that the use of the eligibility list was not a continuing violation.[5]

Plaintiffs Bishop, Flemming, and Brown now appeal. We must decide from which date the 300 day statute of limitations for plaintiffs to file their charge with the EEOC should run: the date of the promulgation of the eligibility

4. Plaintiffs claim in their brief to us that this motion was filed on January 28, 2003.

5. The District Court also dismissed plaintiffs' § 1981 claim under the doctrine of res judicata because it had dismissed that claim in the first action and plaintiffs did not brief the issue when the motion to dismiss was pending. It dismissed plaintiffs' LAD claim because it had dismissed all federal claims against the defendants.

list, or the later dates of either the most recent round of promotions or the date on which the list will expire.[6]

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343, and had supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II. DISCUSSION

Our review of the District Court's dismissal of a cause of action for failure to state a claim as time-barred is plenary. *See, e.g., Anderson v. Consol. Rail Corp.*, 297 F.3d 242, 251 (3d Cir. 2002).

Plaintiffs argue that the promotions and ongoing validity of the eligibility list (until it expires in April 2004) are continuing discriminatory acts, and therefore a continuing violation of Title VII. They argue that each promotion they do not receive is a separate discriminatory act which triggers the running anew of the statute of limitations within which they must file a charge with the EEOC. Defendants argue that these promotions and the ongoing validity of the eligibility list are merely the non-discriminatory effects of the alleged discriminatory format and administration of the exam, which culminated in the promulgation of the list. We agree with defendants and the District Court, and hold that the statute of limitations had run by the time plaintiffs

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6. Plaintiffs do not address the tolling issue in their briefs, and we do not reach it.

filed their charge against the State Defendants with the EEOC.[7]

Whether viewed separately or together, *Bronze Shields, Inc. v. New Jersey Dep't of Civil Serv.*, 667 F.2d 1074 (3d Cir. 1981), and *Delaware State College v. Ricks*, 449 U.S. 250 (1980) mandate our decision. In *Bronze Shields*, the plaintiffs were seeking to become Newark police officers and took a written exam administered by the New Jersey State Department of Civil Service. If they passed the exam, they would have been placed on an eligibility roster in the order in which they scored. When Newark needed to hire new police officers, it would screen applicants on this roster, starting with the applicant with the highest score; applicants who passed the screening were hired. Plaintiffs either failed the exam or some aspect of the screening process, and sued the State and the City for having violated Title VII.

The District Court dismissed the complaint because plaintiffs had not filed their charge with the EEOC within the statute of limitations—there, 180 days from the promulgation of the list. On appeal, plaintiffs argued that the eligibility roster was a continuing violation of Title VII

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7. The parties have briefed whether the State and City Defendants can be considered alter egos such that we should attribute to the State Defendants responsibility for the promotions made by the City Defendants. The District Court thought legitimate questions of fact existed with respect to this issue, and did not rule on it. But even if the State Defendants are deemed responsible for the promotions, these promotions, as we will explain, were the neutral effects of the alleged discriminatory acts, and so cannot serve as triggering dates for the statute of limitations.

for as long as it was in effect and, therefore, that their charge to the EEOC was timely because it was filed during the roster's effective period. We rejected that argument, and held that plaintiffs did not allege that Newark "would have followed anything but a neutral, non-discriminatory procedure in hiring from the list." *Id.* at 1083. The promulgation of the list was the only allegedly discriminatory act, and the continuing effectiveness of the list constituted merely a neutral effect of that act. Consequently, the charge filed with the EEOC was untimely, and we affirmed the District Court's dismissal of the complaint.

In *Bronze Shields,* we relied on the Supreme Court's decision in *Ricks,* in which the Court refused to apply the continuing violation theory. Ricks was a professor who had been denied tenure, and was instead offered a one-year terminal contract, after which his employment would be terminated. *Ricks,* 449 U.S. at 252-53. The District Court concluded that the statute of limitations for filing a charge with the EEOC began on the date Ricks was offered the terminal contract, not, as Ricks had argued, when the terminal contract expired. We reversed, but the Supreme Court reversed us, holding that to determine the timeliness of an EEOC complaint, a court must "identify precisely the 'unlawful employment practice' of which (plaintiff) complains." *Id.* at 257.

> "In order for the limitations periods to commence with the date of discharge, Ricks would have had to allege and prove that the manner in which his employment was terminated differed

> discriminatorily from the manner in which the College terminated other professors who also had been denied tenure."[1]

Id. at 257-58. Ricks made no such allegation. The Supreme Court also held that because Ricks' termination was carried out in a neutral, non- discriminatory manner, the statute of limitations began to run when the termination decision was made and communicated to Ricks, "even though one of the *effects* of the denial of tenure—the eventual loss of a teaching position— did not occur until later." *Id.* at 258. Applying *Ricks* in *Bronze Shields,* we concluded that the promulgation of the eligibility roster was the last allegedly discriminatory act by the defendants. *Bronze Shields,* 667 F.2d at 1083-84.[8]

Bronze Shields and *Ricks* compel our rejection of the continuing violation theory in this case. The discriminatory

8. We recently applied *Ricks* in *Watson v. Eastman Kodak Co.,* 235 F.3d 851 (3d Cir.2000). The plaintiff, Watson, received a letter stating that he was being terminated from his current position, and that he would be terminated from Kodak entirely if he did not find another position at Kodak within one month. Watson filed his EEOC charge within 300 days of his actual discharge, but not within 300 days of the receipt of the termination letter. Applying *Ricks,* we held that Watson's receipt of the termination letter was the act of discrimination that triggered the 300-day statute of limitations. Even though Watson may have stayed at Kodak if he found another position, his allegation of discrimination was with respect to losing the specific position he had held. Because the termination letter was unequivocal as to Watson losing this position, receipt of that letter was the triggering act. As in *Watson,* plaintiffs here identify the specific discriminatory act—the design and administration of the exam, and the promulgation of the list—from which the statute of limitations runs.

act that plaintiffs allege is the design and administration of the exam and the concomitant promulgation of the eligibility list.[9] The neutral use of the list by municipal fire departments is merely the effect of the alleged discriminatory exam. Therefore, the statute of limitations began running on the date that the eligibility list was promulgated.

Plaintiffs' argument that this case is different from *Bronze Shields* because the plaintiffs in that case *failed* the exam, whereas Bishop, Flemming, and Brown *passed,* is unpersuasive. Because these plaintiffs passed, their argument goes, the ongoing validity of the list until its expiration date, and the promotions made based upon it, constitute a continuing violation because plaintiffs are now stuck with their low ranking on that list and have no non- discriminatory avenue by which to seek a promotion. To require them to have filed their EEOC complaints 300 days after the promulgation of the list, but while they still remained on the eligibility list, could result in their being promoted after the filing of their charges and/or their lawsuit—a waste of judicial resources. Better, they contend, to wait until the last discriminatory act—whether that be the most recent round of promotions, or the failure to have promoted them when

9. Neither the charge filed with the EEOC, nor the Complaint, allege that the manner in which individuals were promoted from the list when vacancies arose was discriminatory. To the contrary, the Complaint alleges that the "disparate *impact* of the 2000 examination continues up to the present. On or about July 20, 2002, thirteen additional promotions were made utilizing the defective promotion list." Complaint at ¶ 41 (emphasis added). Only in their Reply Brief do plaintiffs suggest—albeit it without explanation—that the promotions themselves were discriminatory. This suggestion is both belated and bereft of support.

the list expires—to begin running the statute of limitations. While we appreciate plaintiffs' concern for the conservation of judicial resources, that concern does not transform neutral effects into discriminatory acts.

The Sixth Circuit has come to the same conclusion we do. In *Cox v. City of Memphis*, 230 F.3d 199 (6th Cir. 2000), the plaintiffs were white female police officers who passed a promotions examination, were placed on the eligibility list, but were never promoted. They claimed that the administration of the exam was discriminatory in violation of Title VII, but the EEOC dismissed their charges because they had not been filed within 180 days of the promulgation of the list. The Sixth Circuit evaluated the plaintiffs' continuing violation theory in light of their passing the exam, and concluded that the promotions of others or the failure of plaintiffs to be promoted were the *effects* of previous discrimination, and not continuing acts of discrimination themselves. The Court emphasized, in response to plaintiffs' argument that the fact that they passed the exam distinguished them from the plaintiffs in *Bronze Shields* who failed, that

> the mere possibility that one will be hired or promoted despite an allegedly discriminatory ranking does not mean that the failure to promote or hire should be treated as a discriminatory act separate from the original act of discrimination . . . . the assignment of an allegedly discriminatory ranking is the relevant discriminatory act even where the low ranking is not a "certain prelude" to an adverse employment action.

Cox, 230 F.3d at 205 (quoting *Huels v. Exxon Coal USA, Inc.*, 121 F.3d 1047, 1051 (7th Cir.1997)). We agree with both the Sixth Circuit's reasoning and its conclusion.

III. CONCLUSION

In sum, we reject plaintiffs' contention that the continuing violation doctrine applies. Plaintiffs do not allege any discriminatory acts related to the selection of names from the eligibility list for promotion. These promotions were neutral, non-discriminatory effects of the promulgation of the eligibility list. Because plaintiffs' EEOC charge was not filed within 300 days of this promulgation, it was time-barred.

The Order of the District Court will be affirmed.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Opinion.

/s/ Maryanne Trump Barry
Circuit Judge

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED MARCH 10, 2003

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 02-5458 (JWB)

DARIUS D. BISHOP, ERIC BARNES, CHARLES D. BISHOP, WILLIE J. BOOKER, JOHN F. BROWN, SAMUEL EVANS, ALVIN C. FLEMING, TODD HAYES, WILLIAM E. JAMES, and CURTIS JOHNSON,

Plaintiffs,

v.

STATE OF NEW JERSEY, THE NEW JERSEY DEPARTMENT OF PERSONNEL, and MERIT SYSTEM BOARD,

Defendants.

OPINION

BISSELL, *Chief Judge*

This matter comes before the Court on a motion by the defendants State of New Jersey and the New Jersey Department of Personnel ("NJDOP") and Merit System Board ("MSB") (collectively, the "State Defendants"). Plaintiffs filed a Complaint on November 14, 2002; defendants filed the instant motion to dismiss in lieu of filing

an answer. This Court has jurisdiction over the matter pursuant to 28 U.S.C. §§ 1331, 1343 and 1367.

FACTS AND PROCEDURAL HISTORY[1]

Plaintiffs are all African-American males who are currently employed by the City of Newark as firefighters in the Newark Fire Department. (Op. of Sept. 26, 2002 at 3).[2] Plaintiffs have been employed with the City of Newark for an average of 15 years, and all have applied for, and taken the examination for, promotion to the classification of Fire Captain. (*Id.*) Defendants NJDOP and MSB are state agencies that are responsible for the creation and administration of promotional examinations for fire department personnel. (*Id.*)[3]

Plaintiffs allege that the State Defendants violated their civil rights by changing the format and the scoring for the most recent Newark Fire Captain (PM3589A) civil service examination to plaintiffs' detriment and, further, that the selection procedures used are discriminatory to Black and/or minority candidates. (Compl., ¶ 2).[4] Plaintiffs also allege

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1. A complete factual recitation may be found in this Court's Opinion of September 26, 2002.

2. This Opinion is attached to defendants' certification of attorney (hereinafter "Defendants' Cert.") as Exhibit C.

3. The Court mistakenly identified these separate agencies as a single entity in its previous Opinion. (Op. of Sept. 26, 2002 at 3).

4. Plaintiffs' Complaint is attached to Defendants' Certification of Attorney as Exhibit A.

that the State Defendants failed to use alternate methods of selection and violated the Uniform Guidelines on Employee Selection Procedures, the New Jersey Law Against Discrimination ("NJLAD") and 42 U.S.C. § 1981. (*Id.*) Plaintiffs seek compensatory and punitive damages, interest, costs, attorneys' fees and injunctive relief. (Compl. at 14-18).

Plaintiffs allegedly took the written portion of the 2000 Fire Captain Examination in June 2000[5] and the oral portion in December 2000. (Plaintiffs' Supp. Br., ¶¶ 1-3). On or about April 12, 2001,[6] the NJDOP released the eligibility list generated by the 2000 Fire Captain Exam. (*Id.*, ¶ 4). This list is scheduled to expire in April 2004. (*Id.*, ¶ 5). Also on or about April 12, 2001, plaintiff Bishop filed an appeal with the MSB regarding the format and administration of the 2000 Fire Captain Exam. (*Id.*, ¶ 6; Weiner Cert., Exh. A).

The State Defendants allegedly certified the eligibility list in December 2001, and 15 captains were appointed from the list.[7] (Plaintiffs' Supp. Br., ¶ 7). On or about January 21, 2002, plaintiffs filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"),

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5. The State Defendants contend that the written component of the 2000 Fire Captain Exam was actually administered on September 30, 2000. (Defendants' Br., ¶ 9). This discrepancy is irrelevant for the purposes of the instant motion.

6. The State Defendants contend that the eligibility list was issued on April 4, 2001. (Defendants' Br., ¶ 9). Again, this discrepancy is irrelevant for the purposes of the instant motion.

7. Plaintiffs do not specify who made the appointments.

naming only the Newark Fire Department as respondent. (*Id.*, ¶ 8; Weiner Cert., Exh. C). In February 2002, 12 additional captains were appointed from the list. (Plaintiffs' Supp. Br., ¶ 9). On April 9, 2002, the EEOC determined that it was unable to conclude that the information obtained from its investigation established statutory violations and issued a Right to Sue Notice. (*Id.*, ¶ 10; Weiner Cert., Exh. D).

On May 7, 2002, plaintiffs filed a nearly identical Complaint in this Court, Civ. Action No. 02-2219 ("*Bishop I*"), against the same State Defendants, in addition to several City of Newark defendants, alleging the same claims as in the instant Complaint. (Plaintiffs' Cert., Exh B).[8] On June 3, 2002, the NJDOP/MSB denied plaintiff Bishop's appeal of the format and administration of the 2000 Fire Captain Examination. (Weiner Cert., Exh. B). On or about July 22, 2002, 13 additional promotions were made from the eligibility list. (Plaintiffs' Supp. Br., ¶ 13).

On August 2, 2002, plaintiffs filed an EEOC charge of Discrimination against the State Defendants "solely in the remote chance the Court requires such a filing." (Weiner Cert., Exh. F at 2). On August 22, 2002, the State and City Defendants filed a motion to dismiss plaintiffs' Complaint. This Court granted the motion in its entirety against the State Defendants on September 26, 2002. (Plaintiff's Cert., Exh. C (Op. of Sept. 26, 2002 at 13-14). The Court also held that plaintiffs' § 1981 claims against the State Defendants were barred under the doctrine of Eleventh Amendment

8. *Bishop I* also included meritless claims under the 1980 Consent Decree and the Uniform Guidelines on Employee Selection Procedures, which are set forth in 28 C.F.R. 50.14.

immunity. (*Id.* at 17). Finally, the Court held that because all of plaintiffs' federal claims had been dismissed, their state law claims must be dismissed as well. (*Id.* at 21).

On October 9, 2002, plaintiffs received a special Notice of the Right to Sue from the U.S. Department of Justice, which read:

> Because you filed the above charge with the [EEOC], and the Commission has determined that it will not be able to investigate and conciliate that charge within 180 days of the date the Commission assumed jurisdiction over the charge and . . . because you through your attorney have specifically requested this Notice, you are hereby notified that you have the right to institute a civil action under Title VII. . . . This notice should not be taken to mean that the Department of Justice has made a judgment as to whether or not your case is meritorious.

(Weiner Cert., Exh. G). Plaintiffs then filed the case at bar on November 14, 2002. On December 18, 2002, the State Defendants filed the instant motion to dismiss in lieu of filing an answer.

In the instant motion, the State Defendants argue that plaintiffs' claims are barred by *res judicata*, collateral estoppel and Eleventh Amendment immunity, and that plaintiffs also failed to exhaust administrative remedies since their first EEOC charge did not name the State Defendants and their second EEOC charge is untimely. (Defendants' Br.,

¶¶ 10-11). Plaintiffs contend that their second EEOC charge is timely because the 300-day time period was tolled during the pendency of Bishop's state administrative appeal and, moreover, the promotion of candidates from the eligibility list generated by the States Defendants constitutes a "continuing violation" of plaintiffs' civil rights. (Plaintiff's Br. at 4-5; Plaintiffs' Supp. Br. at 1-4). Plaintiffs also contend that the State Defendants and the City Defendants are an "integrated enterprise" or "single employer" for the purposes of Title VII and should therefore be counted as one employer. (Plaintiffs' Br. at 5-16).

DISCUSSION

I. Standard for Dismissal Pursuant to Fed. R. Civ. P. 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a court is authorized to dismiss a claim on the basis of a dispositive issue of law. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)); *Conley v. Gisbon*, 355 U.S. 41, 45-46 (1957). In evaluating a motion under Rule 12(b)(6), the Court accepts all allegations and all reasonable inferences that can be drawn as true and views them in the light most favorable to the plaintiff. *Trump Hotels & Casino Resorts Inc. v. Mirage Resorts, Inc.*, 140 F.3d 478, 483 (3d Cir. 1998) . "A Rule 12 (b) (6) motion should be granted 'if it appears to a certainty that no relief could be granted under any set of facts which could be proved.'" *Morse v. Lower Merion School District*, 132 F.3d 902, 906 (3d Cir. 1997) (quoting *D.P. Enter. Inc. v. Bucks County Cmty. Coll.*, 725 F.2d 943, 944 (3d Cir. 1984).

Appendix B

II. Plaintiffs' Tittle VII Claims

Plaintiffs argue extensively that the State and City Defendants are so closely interrelated as to constitute one employer. (Plaintiff's Br. at 5-16). Although this issue was discussed tangentially in *Bishop I*, the Court did not rule on it. (Op. of Sept. 26, 2002 at 11-12). Plaintiffs' analysis in the instant case has shown that there is a legitimate question whether the State Defendants, through their supervisory and administrative roles, function as plaintiffs' "employer" under 42 U.S.C. § 2000e. Because discovery on this issue is appropriate, dismissal on a Rule 12(b)(6) motion is precluded

Assuming for the purposes of the instant motion that the State Defendant constitute plaintiffs' employer under 42 U.S.C. § 2000e, the Court still must determine whether plaintiffs' EEOC charge is timely filed. In New Jersey, Charges of Discrimination must be filed with the EEOC within 300 days of the accrual of an employee's claim against his employer. 42 U.S.C. § 2000e-5(e). Plaintiffs' first EEOC charge was filed in January 21, 2002, but it was filed only against the Newark Fire Department. This Court already determined in *Bishop I* that plaintiffs' failure to name the State Defendants in their original EEOC charge precludes plaintiffs from suing those defendants for Title VII violations in this Court. (Op. of Sept. 26, 2002 at 13-14). Plaintiffs now attempt to circumvent that ruling by arguing that their second EEOC charge "cured the jurisdiction defect and satisfied the exhaustion requirement as contemplated by the policies of Title VII." (Plaintiffs' Br. at 4).

Appendix B

Plaintiffs correctly assert that the timely filing of a Charge of Discrimination with the EEOC is actually not a jurisdictional prerequisite to suit in federal court but a requirement that is subject to waiver, estoppel and equitable tolling. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *Communications Workers of Am. v. N.J. Dep't of Personnel*, 282 F.3d 213, 216-17 (3d Cir. 2002). Thus, plaintiffs must establish that their second EEOC charge is either timely at the outset or subject to equitable tolling on the facts of this case.

1. Plaintiffs are not Entitled to Equitable Tolling

Plaintiffs argue that their "re-filed" EEOC charge in August 2002 is timely because it is based on the State Defendants' June 3, 2002 denial of plaintiff Bishop's appeal, rather than the January 2001 promulgation of the eligibility list. (Plaintiffs' Br. at 5). In other words, Bishop's appeal to the MSB on the date the list was promulgated in April 2001 purportedly tolled the running of the statutory period in which plaintiffs needed to file an EEOC charge until June 3, 2002, the date on which Bishop's appeal was denied. Plaintiffs therefore assert that their EEOC charge filed in August 2002 is well within 300 days of the State Defendants' adverse determination on June 3, 2002, which event allegedly forms the basis for the instant lawsuit. (*Id.*)

First, the Court notes that plaintiffs do not cite any relevant case law to support this argument. Second and more importantly, plaintiffs' argument was effectively denied in *Delaware State College v. Ricks*, 449 U.S. 250 (1980). In that case, the plaintiff professor was officially denied

tenure in March 1974, and he immediately appealed that decision with the college's Educational Policy Committee ("EPC"). (*Id.* at 252). On June 26, 1974, Ricks was offered a one year "terminal" contract, which he accepted on September 4, 1974. (*Id.* at 252). Shortly thereafter, on September 12, 1974, Ricks was notified that the EPC denied his grievance, and he filed a charge with the EEOC in April 1975. (*Id.* at 254). The Supreme Court rejected Ricks' contention that the date the grievance committee denied his grievance started the limitations period: "[E]ntertaining a grievance complaining of the tenure decision does not suggest that the earlier decision was in any respect tentative. The grievance procedure, by its nature, is a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made." (*Id.* at 261) (emphasis in original); *see also Colgan v. Fisher Scientific Co.*, 935 F.2d 1407, 1416-17 (3d Cir. 1991) (recognizing that *Ricks* "implicitly created a notice requirement to trigger the limitations period; that is, when the employer had established its official position and made that position apparent to the employee by explicit notice.") The Court in *Ricks* also reiterated its holding that "the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations period[]." 449 U.S. at 261 (citing *Elec. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976)).

Similarly, in the case at bar, plaintiff Bishop merely availed himself of a grievance procedure that did not toll the limitations period when he appealed the format and administration of the 2000 Fire Captain Exam to the MSB. *See Ricks*, 499 U.S. at 261. The official eligibility list which

was issued by the NJDOP and used by the City Defendants to make promotions was known to plaintiffs as of the date of its promulgation on or about April 12, 2001. Indeed, plaintiffs argue in their opposition brief that their claims are timely because "they had not obtain [sic] a decision from the [State Defendants] as to *whether the discriminatory act would be remedied* until June 3, 2002." (Plaintiffs' Br. at 5) (emphasis added). Under *Ricks*, however, plaintiffs cannot now rectify their failure to include the State Defendants in their original EEOC charge when they were aware of the State Defendants' alleged discriminatory actions long before Bishop's appeal, or grievance, was denied on June 3, 2002.

2. Use of the Subject Eligibility List was not a Continuing Violation

Plaintiffs also assert that the State and City defendants' continuing use of the eligibility list constitutes a "continuing violation" justifying their second EEOC charge. (Plaintiffs' Supp. Br. at 1-4). Although the list was issued in April 2001, it was used to make promotions several times in December 2001, February 2002 and July 2002. (*Id.*, ¶¶ 7, 9. 13). Plaintiffs contend that the fact that the list was used within 300 days of their second EEOC charge brings their situation within the continuing violation exception and distinguishes if from *Bronze Shields v. N.J. Dept. of Civil Serv.*, 667 F.2d 1074 (3d Cir. 1981). (*Id.* at 2).

In *Bronze Shields*, the Third Circuit held that "the use of an eligibility roster does not constitute a continuing violation." (*Id.* at 1082). The plaintiffs in that case knew as of the date the eligibility roster was issued on May 3, 1975

that they would not be hired by the defendant police department because they were not on the roster, but they did not file a charge with the EEOC within 180 days of May 3, 1975. (*Id.* at 1083). The court determined that the injury to plaintiffs was "'a delayed, but inevitable consequence' of *the allegedly discriminatory employment procedure - here a specific identifiable act, the promulgation of the hiring roster.* It is unlike, therefore, a continuing practice such as in *Bethel v. Jendoco, supra*, which manifested itself only in individual hiring rejections." (*Id.* at 1084 (comparing *Bethel v. Jendoco Constr. Corp.*, 570 F.2d 1163 (3d Cir. 1978)) (emphasis added).

Plaintiffs emphasize footnote 23 of *Bronze Shields*, in which the court distinguished that case from the Second Circuit case of *Guardians Ass'n of the N.Y. City Police Dept., Inc. v Civil Serv. Comm'n of the City of N.Y.*, 633 F.2d 232, 249 (2d Cir. 1980) (holding that the defendants' use of an allegedly discriminatory eligibility list "continued a course of discriminatory conduct" over several years, thus constituting a continuing violation). (*Id.* at 1083 n.23; Plaintiffs' Supp. Br. at 2). The Third Circuit stated that under the holding in *Guardians*, if the defendant had actually used the list within the 180 day statutory period before the plaintiffs filed, their filing would have been timely. *Bronze Shields*, 667 F.2d at 1083 n.23. However, the court declined to follow the Second Circuit and, in a case decided one year later, reaffirmed its holding in *Bronze Shields*. *See Hood v. N.J. Dep't of Civil Serv* , 680 F.2d 955, 958-59 (3d Cir. 1982).

Here, plaintiffs argue that because the State Defendants actually used the list in December 2001, February 2002 and

July 2002, their situation may be distinguished from the holding in *Bronze Shields* and analogized to the holding in *Guardians*. In fact, Judge Higgenbotham makes this very argument in his dissent in *Bronze Shields*, (*id.* at 1091-93), and Judge Sloviter expanded upon it in her dissent in *Hood*, 680 F.2d at 961. Judges Higgenbotham and Sloviter argue that the better approach would be to permit timely filing of a charge with the EEOC to extend from the promulgation of the list to 180 days after its expiration. *Hood*, 680 F.2d at 960; *Bronze Shields*, 667 F.2d at 1093. In both *Hood*, and *Bronze Shields*, however, the court majorities focused upon the fact that the alleged discriminatory policy was isolated to a specific, identifiable act: the drafting of the eligibility roster. *Hood*, 680 F.2d at 958-59;[9] *Bronze Shields*, 667 F.2d at 1083; *Labus v. Navistar Int'l Transp. Corp.*, 740 F. Supp. 1053, 1060 (D.N.J. 1990). Therefore, this Court is constrained by the majority opinions in both *Bronze Shields* and *Hood*.

The Court also notes that the Third Circuit has not moved away from its holdings of 20 years ago; indeed, the court included in a recent case a parenthetical explaining *Bronze Shields*: "when plaintiffs challenged legality of hiring decision, claim accrued when they received notice that they had failed the examination and were not on the hiring roster [*i.e.*, when the roster was issued], not when roster, expired." *Watson v. Eastman Kodak Co.*, 235 F.2d 851, 857 (3d Cir. 2000); *see also Cox v. City of Memphis*, 230 F.3d 199, 204

9. However, the court in *Hood* never actually reached the question whether continuing use of the list constitutes a continuing violation because plaintiff Hood did not file a charge with the EEOC until more than three years after the last use of the list. 680 F.2d at 959).

(6th Cir. 2000) (endorsing the Third Circuit's decisions in Hood and Bronze Shields). The court in *Cox* stated,

> This Court believes the better view if that promotion or hiring from an allegedly tainted promotions roster is not a 'continuing act' but is merely the effect of previous discrimination. It is at the point of promulgation of the roster that a potential plaintiff is aware that alleged discrimination is likely to play a pivotal role in her future advancement. Hence, the promulgation of an allegedly tainted roster is an event that should alert the average lay person to protect his rights.

Cox, 230 F.3d at 204 (internal quotations and citations omitted). Accordingly, this Court concludes that plaintiffs' second EEOC charge is untimely, and plaintiffs are not entitled to equitable tolling. Plaintiffs are still precluded from bringing Title VII claims against the State Defendants in this Court.

III. Title 42 U.S.C. § 1981

This Court explicitly held in *Bishop I* that plaintiffs' § 1981 claims against the State Defendants were barred by Eleventh Amendment immunity. (Op. of Sept. 26, 2002 at 17-18). The State Defendants argue in the instant motion that plaintiffs' § 1981 claims are now subject to *res Judicata* and collateral estoppel and must be dismissed.

Appendix B

Res Judicata, which is also known as claim preclusion, is the doctrine by which a final judgment of a court is binding upon the parties in any subsequent litigation involving the same cause of action. *Gregory v. Chehi*, 843 F.2d 111, 114 (3d Cir. 1988) ("Claim preclusion replaces '*res judicata*' and encompasses both merger and bar principles in giving dispositive effect in a later action to a prior judgment.") Collateral estoppel, which is also known as issue preclusion, "is somewhat more limited than claim preclusion because it bars relitigation only of an issue identical to that adjudicated in the prior action." (*Id.*) Under these principles, a court may not reconsider claims or issues that were actually decided in the prior case. (*Id.* at 115-16).

Plaintiffs do not address the dismissal of their § 1981 claims in their opposition brief. Accordingly, the Court must conclude that plaintiffs concede that these claims are barred under the doctrines of *res judicata* and collateral estoppel.

IV. Plaintiffs' State Law Claims Under the NJLAD

As in *Bishop I*, because all of plaintiffs' federal claims against the State Defendants have been dismissed, the Court must also dismiss plaintiffs' state law claims against them. (*See* Op. of Sept. 26, 2002 at 21 (citing *Raygor v. Regents of the Univ. of Minnesota*, 534 U.S. 533 (2002)). The Supreme Court in *Raygor* held that state defendants have Eleventh Amendment immunity for all state claims brought in federal court pursuant to 28 U.S.C. § 1367. 534 U.S. at 541-42.

Appendix B

CONCLUSION

For the foregoing reasons, the State Defendants' motion to dismiss plaintiffs' Complaint is granted. That Complaint is dismissed in its entirety, with prejudice and with costs.

s/ John W. Bissell
JOHN W. BISSELL
Chief Judge
United States District Court

DATED: March 10, 2003